FILED
MAR 21 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

No. 781.

SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, and LINWOOD PARK, INC., Sections 1 to 13 inclusive, each a corporation of New Jersey,

Petitioners,

v.

NORMAN P. MASON, Commissioner of the Federal Housing Administration, and ALBERT M. COLE, Housing and Home Financing Administrator, and FEDERAL HOUSING ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

VAN RIPER & BELMONT,
Attorneys for Petitioners,
744 Broad Street,
Newark 2, New Jersey.

WALTER D. VAN RIPER,
Of Counsel with Petitioners.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton St., Newark 5, N. J., U. S. A.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	9
1. Important questions of public concern have been decided by the Courts below upon a totally inadequate record	9
2. The actions of the Courts below violated Rule 56 of the Rules of Civil Procedure (28 U. S. C. A.)	11
3. The record shows that there were disputed questions of material fact	12
4. The Court below has deprived plaintiffs of due process, by denying them the right to a decision on appeal from a finding by the District Court on summary judgment that the plaintiffs are in default concerning the first and second alleged defaults	19
5. Since the instant controversy requires the construction of the provisions of a Certificate of Incorporation of a New Jersey Corporation, such determination should have in the first instance been left to the determination of New Jersey Courts	20

PAGE

6. The proper construction of Section 1702, Title 12 U. S. C. A., the National Housing Act, is a matter of public concern 20

APPENDIX:

Opinion on Motion to Remand 25

Opinion and Findings of Fact and Conclusions of Law 31

Opinion of the Court 37

Order Amending Opinion 43

Table of Cases.

	PAGE
Allen v. *Keck*, 212 F. 2nd 425, 427 (C. A. 8th 1954)	12
Borg v. *International Silver Co.*, 11 Fed. (2d) 147 (1925)	16
F. H. A. v. *Burr*, 309 U. S. 242, 245 (1939)	21
Goodnow v. *American Writing Paper Co.*, 73 N. J. Eq. 692, 69 A. 1014 (E. & A., 1908)	15
Hunter v. *Mitchell*, 180 F. 2nd 763, 764 (C. A. D. C. 1950)	12
Jones v. *Elliott*, 94 Fed. Sup. 567, 568 (D. C. Va. 1950)	21
Kennedy v. *Silas Mason Co.*, 334 U. S. 249, 256 (1948)	10
Malley v. *Old Colony Trust Company*, 299 Fed. 523 (CCA 1st, 1924)	15, 17
Sarner v. *Mason*, 228 F. 2nd 176, 178 (1955)	6
Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944)	11
Spector Motor Service v. *McLaughlin*, 323 U. S. 101	20
Tennessee v. *Davis*, 100 U. S. 257 (1879)	21
The State v. *Morristown Fire Association*, 23 N. J. L. 196 (1851)	14
Thompson on Corporations (Third Edition, 1927), 245	14
Vale v. *Bonnett*, 191 F. 2nd 334, 336 (C. A. D. C. 1951)	12

Statutes.

	PAGE
National Housing Act (12 U. S. C. A.), 1702 Article VI, Section 608	2, 3, 4, 5, 7, 20, 22
N. J. R. S. 14:11-5	16, 17
12 U. S. C. A. 1743	4
28 U. S. C. A. 1254(1)	2
28 U. S. C. A. 1331	22
28 U. S. C. A. 1332	22
28 U. S. C. A. 1441	22
28 U. S. C. A. 1442	21, 22

Rule.

Rule 56—Federal Rules of Civil Procedure (28 U. S. C. A.)	11

IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

No. .....

SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, and LINWOOD PARK, INC., Section 1 to 13, inclusive, each a corporation of New Jersey,

Petitioners,

v.

NORMAN P. MASON, Commissioner of the Federal Housing Administration, and ALBERT M. COLE, Housing and Home Finance Administrator, and FEDERAL HOUSING ADMINISTRATION,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 21, 1955.

Opinions Below.

The opinion of the District Court is reported in 128 Fed. Supp. 165 (N. J. 1955). The opinion of the Court of Appeals is reported in 228 F. 2nd 176 (C. A. 3rd Cir.). Copies of the opinions are included in the appendix attached to the petition.

Jurisdiction.

Judgment of the Court of Appeals was entered on December 23, 1955. A timely petition for rehearing was filed, which petition was denied on January 10, 1956. Jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

Questions Presented.

The plaintiff corporations undertook to construct in 1949 and thereafter did construct and operate certain housing projects pursuant to the provisions of Section 608 of Article VI of the National Housing Act. Final approval of the construction was given in 1950. In 1954 the defendants sought to review matters long since approved by those to whose discretion such matters had been committed in 1949 and 1950. Believing the defendants to be wholly without such authority, the plaintiffs refused to supply certain information on the ground that there had been full compliance in 1949 and 1950 because of information submitted to the Federal Agency at that time. Thereupon the defendants claimed that several defaults had been committed by plaintiff corporations under their respective Certificates of Incorporation whereby the defendants were authorized to remove the existing directors and elect new directors.

Each of the defaults claimed requires the examination of the records of the Federal Housing Authority for 1949 and 1950. On the wholly unsubstantiated assertions and allegations of the defendants, the District Court made a finding that there were three separate defaults. The Court of Appeals made a finding that one default (the third) did exist. The Court of Appeals did not pass upon the propriety of District Court's determination on summary judgment of the alleged first and second defaults, and denied plaintiff's motion asking for a rehearing. The plaintiffs have thus been denied the right of appeal in such issues. The following questions are thus presented:

1. Was not the Court of Appeals required to reverse the judgment of the District Court as being violative of Rule 56 of the Federal Rules of Civil Procedure (28 U. S. C. A.)?

2. Does not the record clearly disclose that there are disputed questions of material facts with respect to each of the claimed defaults, so much so that it must be held as a matter of law that there was an abuse of discretion?

3. Did the refusal of the Court of Appeals to consider the propriety of the finding by the District Court on summary judgment of the first and second defaults constitute a denial to the plaintiffs of their right of appeal on such issues?

4. Since the matter concerns the construction of a New Jersey certificate of incorporation, should the matter not have been determined in the first instance by the New Jersey Courts?

5. Just what was intended by the waiver of immunity clause of the Federal Housing Act and whether the District Court had jurisdiction?

Statutes Involved.

12 U. S. C. A. 1702, which authorized suit against the Commissioner in any court of competent jurisdiction, State or Federal, and 12 U. S. C. A. 1743, under which the Federal Housing Administration made the commitment to insure the mortgages of plaintiff corporations.

Statement.

The present matter was before the Court of Appeals for the Third Circuit on an appeal from a judgment of the United States District Court, District of New Jersey, entered on motion for summary judgment against the Plaintiffs in favor of the Defendants. The said judgment was entered upon a finding by the Trial Court that the plaintiff corporations had committed "defaults" within the terms of their certificates of incorporation as follows:

1. that they had effected a change in the capital stock of the corporation in violation of Paragraph Sixth (e) of the Certificate of Incorporation;

2. that they had entered into a business transaction in violation of Paragraph Third (d); and

3. that plaintiffs had refused to supply information to the Federal Housing Administration in violation of Paragraph Eighth (f).

The Trial Court had made its determination upon the basis of affidavits which alleged the existence of certain facts, which have been denied by the plaintiffs, thereby denying to the plaintiffs the right to have such matters determined on a complete record. The pertinent provisions of the Certificates of Incorporation are included in the appendix attached hereto.

The plaintiff corporations (Linwood Park, Inc., sections 1 to 13) were organized in 1949 under the laws of New Jersey for the purpose of constructing and operating housing projects in the Borough of Fort Lee, New Jersey, under and pursuant to the provisions of Section 608 of Title VI of the National Housing Act. The Certificate of Incorporation of each of the corporations provides that the authorized capital stock shall be as follows: one hundred (100) shares of preferred stock at par value $1.00 per share, which was issued to the Federal Housing Administration; and two hundred shares of common stock with no par value.

Prior to the formation of these corporations, there was submitted to the Federal Housing Administration, by an approved mortgage lending institution, applications for the issuance of commitments to insure mortgage loans on the proposed projects. The Federal Housing Administration undertook to issue the mortgage commitments in question, the commitments calling for the erection of a shopping center to conform to certain terms, conditions and requirements.

After the issuance of the said commitments, the plaintiff corporations proceeded to have the housing projects in question erected and constructed, all in accordance with plans and specifications filed with the Federal Housing Administration and approved by such agency and its underwriters.

The affidavit of the defendant Sarner discloses that the projects were constructed by a building corporation, whose stock was owned by the same persons as the defendant corporations. The method and manner of constructing the said projects was approved by the Federal Housing Administration. After completion and final approval by the Federal Housing Administration, the said Administration authorized the private lending institutions to make final

payment on account of the respective mortgages and thereafter endorsed the bonds for insurance. The projects were all completed by 1950 and were financed with private funds.

The Court of Appeals stated in its opinion *Sarner* v. *Mason*, 228 F. 2nd 176, 178 (1955):

> "From the affidavits filed by the defendants in this case, the statements of which are not denied, it appears that the Federal Housing Administration loaned large sums of money to the corporate plaintiffs."

As shown, this is not a correct statement. Not a dollar of money was loaned by any Federal agency. What the Federal Housing Administration did was to guarantee mortgage loans made by banks.

The plaintiffs showed by affidavits that the owners of the building corporation and the plaintiff corporations were the same persons and that the profit that is customarily taken by the building corporation was permitted to remain with the defendant corporations. There was thus created a substantial cash surplus, which was used in part to purchase the stock presently held by the treasuries of the corporations and in part to make loans to finance a shopping and recreational center, which were necessary for the proper and adequate operation of the projects and which were within the intendment of the original commitment.

On August 26, 1954, years after full and final approval had been given by the Federal Housing Administration, then in control, the defendant Norman P. Mason, directed a communication to each of the 13 corporations directing them to call a meeting of stockholders, the object of which was to remove the existing Board of Directors and elect a new board because of certain alleged defaults. The letter disclosed that the defendant Commissioner claimed such

right by reason of the provisions of the charter of New Jersey corporations and not by reason of any power under the National Housing Act. The defaults which were claimed by the defendant concerned matters long since approved by the officers of the Federal agency, to whom at that time had been committed the responsibility and obligation of passing on such matters.

The plaintiffs advised the defendants on September 1, 1954 that there were no defaults and that the preferred stockholders were therefore without authority to request the holding of such a meeting. Thereafter the defendants gave notice of a meeting of preferred stockholders to be held on September 22, 1955 for the purpose of removing the existing Boards of Directors and electing new directors. Immediately thereafter the plaintiffs instituted a civil action in the Superior Court of New Jersey seeking to enjoin the holding of such meeting. The plaintiffs alleged (1) that they did not fail to answer any questionnaire which they were legally obligated to answer; (2) that there has been no change in capital structure of the respective corporations; and (3) that they have not engaged in business other than that for which they were organized.

The Trial Court found that the plaintiffs had defaulted with respect to each of the claimed defaults, upon the unsupported affidavits of defendants, notwithstanding that the plaintiffs had submitted affidavits denying the defaults and asserting full and complete compliance with the terms and conditions of their undertaking with the Federal Housing Authority, and thereby raising a genuine issue of fact.

The matter was appealed to the Court of Appeals which found that the plaintiffs had defaulted in one respect only, namely, by their refusal to answer certain questionnaires submitted by the present defendant. The Court did not and could not, because of the meager state of the record,

consider the right of the present Commissioner to require such answers concerning matters long ago submitted by them to the former Commissioner and approved by the said former Commissioner. The Court made its determination without one iota of testimony concerning the rules and regulations, the reports required, and the basis of approval of the projects in 1949 and 1950. Also, the Court of Appeals relied upon one claimed default—the third. The Court of Appeals refused to pass upon the question of the power of the Trial Court to grant summary judgment on the important issue concerning change in capital structure and on the issue concerning the engaging in other business. The importance of an adjudication of these issues by an Appellate Court is emphasized by the fact that they have not heretofore been passed upon by any Federal Court of Appeals.

The Certificates of Incorporation provide the manner of the return of a corporation to its common stockholders when a default has been cured. The only default which was affirmed by the Court of Appeals was cured almost immediately thereafter by the filing of the questionnaires, but the corporations remain in the control of directors designated by the defendants and who refuse to relinquish their control because of the District Court judgment. The plaintiffs have alleged and do allege great damage if not permitted to operate the projects which they own. By its decision, the Court of Appeals has effectively denied to the plaintiffs their right of appeal with respect to the said other two claimed defaults.

Because of the charter provisions concerning the curing of defaults, each of the alleged defaults must be considered as a separate and distinct issue. The plaintiffs have the right to have each one passed upon by the Court of Appeals. Not only is this a right which cannot be taken away from the

plaintiffs, but it is the only way in which they can be guided in determining which, if any defaults they are required to cure, in order to secure the return to them of their corporations. The Court of Appeals was so advised by Petition for Rehearing submitted on December 30, 1955, which was denied on January 10, 1956.

Reasons for Granting the Writ.

1. Important questions of public concern have been decided by the Courts below upon a totally inadequate record.

The defendant Mason requested certain information from the plaintiffs on August 26, 1954, concerning matters long since approved by his predecessors and concerning which there is a wealth of information already in the files of the Federal Housing Administration. The plaintiffs contended that there had been prior compliance and that the defendants were not authorized to require such information to be furnished again.

The question which was presented was not whether or not the plaintiffs had refused to answer but whether the defendants were authorized in 1954 to again demand the answering of extensive questionnaires concerning matters over which the present defendants Mason and Cole had had no supervision or jurisdiction. If there had been any wrong doing, which is denied, the investigation thereof has been committed by law to other agencies, not the Federal Housing Administration.

Since the issue was the power of the present Commissioner to reopen matters long since passed upon and approved by the duly authorized officers, it necessarily follows that the Courts below could not conceivably determine

such issue without a full disclosure being made of the 1949 and 1950 records of the Federal Housing Authority for the purpose of determining (1) what did the rules and regulations provide in 1949 and 1950; and the administrative interpretation thereof; (2) how were such matters administered; and (3) to what extent had the plaintiffs complied with such rules and regulations.

This is an important question of great public concern. If the present Commissioner has the power in 1954 to again go into the details of transactions completed in 1949 and 1950 and previous thereto, then any successor Commissioner would in turn have such power. It could happen again and again. No transaction would ever be completed. No record could ever be destroyed. There is nothing in the law to justify such a power. Reason and logic says that such could never have been intended by the law which gave the Commissioner the power to approve these projects in 1949 and 1950.

In *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256 (1948), this Court said:

> "But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

The plaintiffs respectfully submit that the present case presents a question of far-flung import—just how far may present administrative agencies go in reopening matters long since finally determined by their predecessors? It is of broad public importance that any person in the position in which the present defendants find themselves, should be permitted to show upon a full record whether

or not the pertinent provisions of the Certificates of Incorporation, which were included at the behest of the then Commissioner, were only intended to be concerned with (1) the financial position of the plaintiffs at the time of the construction and putting into operation of the projects and (2) those things having to do with the mortgage obligation and compliance with the terms thereof.

2. The actions of the Courts below violated Rule 56 of the Rules of Civil Procedure (28 U. S. C. A.).

Rule 56 of the Federal Rules of Civil Procedure (28 U. S. C. A.) provides that summary judgment shall only be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. This Court in reversing a judgment entered on motion for summary judgment said in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944):

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Insurance Co. *v.* Gentile Brothers Co., 109 F. 2d 732; Whitaker *v.* Coleman, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."
>
> " • • • 'all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment.' "

The Courts have uniformly held that a motion for summary judgment does not call for a trial of the issues on the merits but calls only for an inquiry to determine whether or not any genuine issues do exist as to material facts. *Allen* v. *Keck*, 212 F 2nd 425, 427 (C. A. 8th 1954). *Vale* v. *Bonnett*, 191 F 2nd 334, 336 (C.A.D.C. 1951); *Hunter* v. *Mitchell* 180 F 2nd 763, 764 (C.A.D.C. 1950). The Court below completely ignored this rule. Important issues of material fact have been decided against the plaintiffs without an opportunity to be heard on a proper record.

3. The record shows that there were disputed questions of material fact.

It is obvious that it must be determined just what the then Commissioner intended when certain provisions were included in the respective Certificates of Incorporation. To make such determination requires an exhaustive study of the rules and regulations and the administrative practices of the Federal Housing Authority in 1949 and 1950. It may not be said that the present record contains any part of such material. In addition, the present record discloses that there are genuine issues of material facts concerning each of the claimed defaults.

(a) A genuine issue of a material fact exists with respect to the claim that the purchase of stock by the treasury constituted a change in capital stock.

The Court of Appeals did not pass upon this question although an appeal had been taken from the finding of the District Court that such purchase constituted a change in capital stock. The District Court recognized by its opinion that an issue does exist concerning the existence of a surplus when it said "Whether the purchase was made out of surplus or not does not seem to be apparent from the plead-

ings." But that Court held that in any event the purchase constituted a change in capital stock. Thus without even a colorable attempt to determine just what the parties in 1949 meant by the phrase "change in capital stock" the Court determined not only that the Solow transaction constituted a change in capital stock but that such a change constituted a default under Paragraph Seventh (a) (4) of the Certificate of Incorporation.

One of the defaults alleged by the defendants and found to exist by the District Court was a violation of that provision of the Charter which provides that:

> "The corporation shall not without prior approval of the holders of a majority of the shares of preferred stock * * * redeem or cancel any of its shares of preferred stock, or effect any changes whatsoever in its capital stock."

The defendants claimed a default because the corporation purchased some of its outstanding capital stock and carried it as Treasury stock. Thus the immediate question presented was what was meant by the language of the Corporate Certificate when it prohibited "any changes whatsoever in its capital stock."

An adjudication of this question is of great importance not only to the instant case but in the many other cases throughout the Country where similar activity has been engaged in by these housing corporations. The question, therefore, as to what constitutes "capital stock" is both one of law and of fact in so far as the latter situation applies to the interpretation which this language had been given by the Administrative agency; and, of course, the granting of summary judgment deprived the Plaintiffs of the opportunity of showing to the Court what this interpretation had been.

The question of what the words "capital stock" means has, so far as research has disclosed, not been passed upon by any Appellate Court as it affects corporations of the type involved here. However, these are New Jersey corporations and the Courts of that State in decisions covering a period of many years have definitely defined the meaning of the words "capital stock" as have also some of the Federal Courts.

Over a hundred years ago, in *The State* v. *Morristown Fire Association*, 23 N. J. L. 196 (1851), the then Chief Justice of our Supreme Court said:

> "The phrase 'capital stock' as employed in acts of incorporation, is never, that I am aware, used to indicate the value of the property of the company.
>
> "It is very generally if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. The amount thus contributed constitutes the 'capital stock' of the company. The value of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same.
>
> "The funds of the company may fluctuate. Its capital stock remains invariable save by legislative enactment. This distinction between the value of the property of incorporated company and their capital stock is perfectly familiar."

Thompson on Corporations (Third Edition, 1927), page 245, says:

> "The capital stock, in its strict legal sense means the amount of money subscribed and paid for the purpose of conducting the financial concerns of the corporation."

In *Malley* v. *Old Colony Trust Company*, 299 Fed. 523 (CCA 1st, 1924), the Court, at page 528, said:

> "Capital has a settled meaning when used with respect to the property of a corporation, and applies only to the property or amounts contributed by the stockholders as the fund or basis of the enterprise for which the corporation was formed."

In *Goodnow* v. *American Writing Paper Co.*, 73 N. J. Eq. 692, 69 A. 1014 (E. & A., 1908), the Court, in considering what was surplus, said:

> "When the legislature forbids the dividing, withdrawing or paying to the shareholders any part of the capital stock, it means the capital actually invested. When it forbids the reduction of capital stock, it means the share capital subscribed, or the authorized capital.
>
> "We are led to the conclusion that the words 'capital stock' in the first instance means capital actually invested."

Does not the language just quoted squarely cover the instant case? It talks about "dividing, withdrawing or paying * * * any part of the capital stock". Our Charter talks about a change in the capital stock. What other changes could there be beyond "dividing, withdrawing or paying"? Are not these words merely synonymous for "increasing" and "decreasing" as it refers to capital stock? Incidentally, both of the latter methods are provided for by statute, and either of these results can be accomplished only in the statutory manner.

What was the capital stock of the corporation when it started business, and what has it always continued to be? Nothing more nor less than the $14,300.00 (referring to the corporations in the aggregate as one) which was paid in as the original investment. This has not been disturbed

and the defendants do not contend that this figure has in any way been altered. If an accountant were preparing a financial statement of the corporations (in the aggregate) as of today, what figure would he place opposite the designation "capital stock"? Of necessity, it would have to be $14,300.00 because that figure has not changed. The surplus probably has, but not the capital. Whether the money which was used to purchase the corporations' own shares of stock was, as a matter of fact, surplus, or whether it was merely money which happened to be on hand, made available by a loan, the amount of which may or may not have been justified, may all be open to question and as such could be determined only as the result of the production of all of the evidence pertinent thereto, but there can be no question but what the "capital stock" as it has been defined by the authorities hereinabove cited, was in no sense impaired and continued to remain as of this day the same.

The purchase by the corporation of its own stock, and thereafter carrying it as Treasury stock, does not in itself either redeem or cancel that stock. This question was dealt with by Judge Hand, speaking for the Second Circuit in *Borg* v. *International Silver Co.*, 11 Fed. (2d) 147 (1925), when he said that:

> "Where a corporation acquired some of its stock without taking steps to retire it under the corporation law of New Jersey, the stock was not retired as between the corporation and the State."

Judge Hand took cognizance here, of course, of the fact that the statute sets forth an expressed means of retiring shares of corporate stock (R. S. 14:11-5).

In this same case, Judge Hand, in referring to the fact that the corporation was carrying its own stock acquired

by it on the books as Treasury stock, said that the manner in which the shares were carried on the books was immaterial, that it was the intent of the corporation with respect to such shares that counted, and further, that the mere fact that they were carried as Treasury stock did not indicate that they were retired.

Judge Hand refers to the "intent of the corporation" as being what counts. We assume he meant that it was the intent, as expressed by formal action for, as a matter of fact, it is more than the mere intent which controls; it is full compliance with the statute (R. S. 14:11-5) for, no matter what the corporate officers may have in their own minds intended, nevertheless, the law will neither recognize nor give legal effect to that intent, without compliance with the formal requisites which the statute requires for retirement of stock.

Clearly, therefore, if in the instant case the words "capital stock" mean what the Courts of New Jersey and the Federal Circuit Court of Appeals in the *Malley* case (*supra*) said, then what happened here did not constitute a change in the capital stock and thus there was not a default. This statement, we think, points out very clearly how essential it is that this question be decided by the Appellate Court and how the Plaintiffs were in effect deprived of their right of appeal by the refusal of the Circuit Court of Appeals, to adjudicate the question both as to the meaning of the phrase and as to whether or not summary judgment was justified.

(b) A genuine issue of material facts exists with respect to the charge of engaging in other business.

The Corporate Charter provides that the corporation shall not engage in any business other than operating the housing projects. The Affidavits showed that the housing

corporation made loans to two other corporations owned by the same individuals who owned the stock of the housing corporation. The borrowing corporations were the Linwood Business Center, Inc. and the Linwood Recreational Center, Inc. The Affidavits also showed that the money was borrowed for use in constructing a shopping center adjacent to the housing project and claimed by the Plaintiffs to be a necessary adjunct thereof, and further, that the original plans for the housing projects submitted to and approved by the Federal Housing Administration, contemplated such a shopping center. These loans were amply secured by the notes of the borrowing corporations, were amortized, and bore interest at the rate of five per cent. The housing corporations did not in any way own or operate the shopping or recreational enterprises.

The question then before the Court was whether or not the making of these loans, which in effect was nothing more nor less than the investment by the housing corporations of surplus funds in their Treasury, constituted "engaging in any other business" on behalf of the mortgagor housing corporations and in violation of the intent of the Charter.

Thus it would appear that before arriving at a conclusion based upon a construction of the inhibited phrase that the Court was not only entitled to have but should have the full benefit of the interpretation which the Federal Housing Administration itself had given to the prohibitory language of the Charter. By virtue of the summary judgment which was granted, the plaintiffs were deprived of the opportunity to take the testimony of the Agency officers and representatives. It was particularly important that the plaintiffs have the opportunity of producing this testimony for the purpose of interpretation given to the language by the Federal Housing Administration at the time when

the loans were made and when the Administration had notice of the fact that they were made.

One of the outstanding reasons why summary judgment should not have been granted in the instant case on all of the alleged defaults is because the fact is that the present administration of the Federal Agency is, as of 1954, attempting to put its interpretation upon rules and regulations which were interpreted differently by the administrative officers in office in 1950 and 1951 when the acts complained of took place and were, so the plaintiffs claim, approved by the Administration as it was then composed.

It would seem, as a matter of law, that the Agency, the same as any other corporation, was bound by the acts of its duly constituted officers at the time when they acted, and that merely because there has been a change of political administration with a consequent change in the philosophy of administering the affairs of the Agency, that those things which were lawful under a prevous Administration's interpretation cannot now become unlawful because the present administration interprets otherwise.

4. The Court below has deprived plaintiffs of due process, by denying them the right to a decision on appeal from a finding by the District Court on summary judgment that the plaintiffs are in default concerning the first and second alleged defaults.

The Charter provides the manner in which defaults may be cured. The plaintiffs have, in consideration of the Court's finding, cured the third claimed default. Nevertheless, they are still faced with a District Court judgment based upon the findings that they had committed the first and second defaults.

These findings were appealed to the Circuit Court of Appeals, in accordance with plaintiffs' right, but that Court

refuses to pass upon the questions involved therein, and whether or not, as to them, it was proper for the District Court to enter a summary judgment. By this denial, the Circuit Court of Appeals has effectively and, we believe, erroneously denied to the plaintiffs the appeal on such issues which is permitted to them by the law and the rules, and thus deprived the plaintiffs of due process.

5. Since the instant controversy requires the construction of the provisions of a Certificate of Incorporation of a New Jersey Corporation, such determination should have in the first instance been left to the determination of New Jersey Courts.

In *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, this Court of its own motion for the first time in that case raised the question of the propriety of undertaking the determination of questions of local law which should be heard in the local Courts. The questions of local law would have been determined by the State Courts in the instant case if the Courts had properly construed 12 U. S. C. A. 1702 which authorizes the Commissioner to sue and be sued in any Court of competent jurisdiction.

6. The proper construction of Section 1702, Title 12 U. S. C. A., the National Housing Act, is a matter of public concern.

The construction of housing projects and other activities within the jurisdiction of the Federal Housing Administration have been carried on in every State and extensively throughout most of the States. Quite properly, Congress sought to minimize the difficulties attendant upon litigation that might arise out of such activities by providing in Section 1702 of the National Housing Act as follows:

> "The Commissioner shall, in carrying out the provisions of this sub-chapter and sub-chapters II, III, VI to VIII and X of this chapter be authorized, in his official capacity, to sue and be sued in any Court of competent jurisdiction, State or Federal."

This was in keeping with the spirit of the rule stated in *F. H. A.* v. *Burr*, 309 U. S. 242, 245 (1939), wherein it was said:

> "As indicated in *Keifer & Keifer* v. *Reconstruction Finance Corp., supra*, we start with the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities *should be liberally construed.* This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the *increasing tendency of Congress to waive immunity* where federal governmental corporations are concerned." (Emphasis supplied.)

The defendants maintained, and the Court of Appeals so found, that notwithstanding such provision, the Commissioner was authorized by 28 U. S. C. A. 1442 to remove this civil action from the State Court to the United States District Court. By such holding the Court of Appeals has ignored the spirit of the rule stated in the *Burr* case.

The Court dealt with 28 U. S. C. A. 1442 in *Jones* v. *Elliott*, 94 Fed. Sup. 567, 568 (D. C. Va. 1950), wherein it was said:

> "It accomplishes with minimal confusion, the evident Congressional purpose that all suits against officers of the government for acts done within the ambit of their authority, be tried only in the Courts of the United States."

The Court cited *Tennessee* v. *Davis*, 100 U. S. 257 (1879), in support of such conclusion.

It certainly would seem that when Congress specifically provided that the Commissioner may be sued in a State Court, it never intended that the Commissioner could immediately remove the action to the Federal Courts. To hold otherwise would be to ignore those specific provisions.

How, then, can the two provisions be reconciled? The circumstances surrounding the present action suggest a logical answer:

> First. In the present action, the Commissioner is being sued *in his official capacity.* In such capacity, the suit cannot result in any personal liability of the Commissioner. In such a situation, 12 U. S. C. A. 1702 is applicable and the suit was properly brought in the State Court where it could be removed only if the suit was removable under 28 U. S. C. A. 1331, 1332 or 1441. It was not removable under 28 U. S. C. A. 1442 because of the waiver of immunity from suit contained in 12 U. S. C. A. 1702.
>
> Second. If it should develop that the plaintiffs do suffer loss by reason of unauthorized acts of the defendants and an action should be instituted against them personally to recover damages, then such action would be removable under 28 U. S. C. A. 1442. They would be sued for acts done *under color of their offices.* It was such personal liability for acts done under color of authority that Congress had in mind adopting 28 U. S. C. A. 1442.

The question of the proper construction of 12 U. S. C. A. 1702 is one of major concern which should be decided by this Court.

Conclusion.

For the foregoing reasons, particularly because of the deprivation of due process, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

VAN RIPER & BELMONT,
Attorneys for Petitioners,

By WALTER D. VAN RIPER,
a Member of the Firm.

APPENDIX.

OPINION ON MOTION TO REMAND.

MEANEY, District Judge.

The plaintiffs, Sidney Sarner, Leonard Sarner and Maurice Sarner, are the owners and holders of all of the common stock of the 13 plaintiff corporations identified as Linwood Park, Inc., Sections 1 to 13 inclusive. The Commissioner of the Federal Housing Administration in accordance with the provisions of the Federal Housing Act, 12 U. S. C. A., sections 1738 and 1743, and the regulations promulgated under that act, purchased 100 shares of preferred stock at $1.00 per share in each of the 13 plaintiff corporations. Under the act and the regulations issued in conformity thereto these preferred shares gave the Commissioner majority voting rights in the event of certain defaults under the mortgage, or violations of provisions of the charter of the mortgagor, or violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner.

On August 28, 1954 the defendant, Norman P. Mason, Commissioner of the Federal Housing Administration, mailed to each of the 13 corporations a registered letter notifying them of a proposed meeting of the preferred stockholders for the purpose of electing new boards of directors, and on the same date issued a statement to the effect that he was calling such a meeting. The basis for such action on his part was alleged violations of the Federal Housing Act, the regulations applicable thereto and the charter provisions of the 13 corporations. The violations allegedly consisted of redemption of capital stock of the plaintiff corporations, the lending by them of large sums of money, charges of extra fees against tenants without Federal Housing Administration approval and refusal to answer a questionnaire concerning their finances and operations.

At this point the plaintiffs instituted an action in the Chancery Division of the Superior Court of New Jersey to enjoin the defendants from holding the meeting of preferred stockholders referred to. This cause was removed to the United States District Court for the District of New Jersey, and subsequently motion was made by the plaintiffs to remand the case to the New Jersey Superior Court. The grounds asserted for removal to this court from the New Jersey state court were as follows:

The action in question is a civil action of which the United States District Court has original jurisdiction under provisions of Title 28 U. S. C. A., sections 1331 and 1332, and is one removable to this court under provisions of Title 28 U. S. C. A., sections 1441 and 1442. In their motion to remand, the plaintiffs deny jurisdiction of this court, question the statutory amount in controversy, allege that there is no diversity of citizenship, and insist that there may be no removal from state to federal court by virtue of the provisions of Title 12 U. S. C. A., section 1702, authorizing the Commissioner of the Federal Housing Administration to sue and be sued in any court of competent jurisdiction, state or federal.

It may be well to take up at the outset the effect of the provisions of Title 12 U. S. C. A., section 1702. The plaintiffs were enabled to bring suit against the defendants by virtue of this section of the Federal Housing Act. Sovereign immunity on the part of the federal instrumentality involved was specifically waived by Congressional action, and there was authorization to sue or be sued in any court of competent jurisdiction, state or federal. The contention of the plaintiffs is that this authorization permits the individual or individuals suing the Federal Housing Commissioner to select the forum for the institution of the suit and to pursue it to its conclusion in that forum. Citing the pronouncement of Justice Douglas in the case of *F. H. A. v. Burr*, 309 U. S. 242, wherein he said, "Clearly the words 'sue and be sued' in their normal connotation embrace all

civil process incident to the commencement or continuance of legal proceedings.", the plaintiffs infer as a necessary consequence that the right to sue in the state courts carries with it the right to prosecute the suit in the same court. That this is one construction of the language used is evident. But in determining the import of the words used by Justice Douglas we may not remove them from their context. In the *Burr* case, just cited, final judgment had been obtained in the state court and the question that arose was whether the Federal Housing Administration was subject to garnishment. The court decided that garnishment was a process provided for the collection of debts, after judgment, and as such an incident to the continuance of legal proceedings. It does not directly or by necessary inference relate to the question of the right of removal of a cause from a state to a federal court, nor does it directly or by necessary inference deprive the governmental agency of the right granted litigants in 28 U. S. C. A., section 1442. Nor does the further finding of the learned Justice that Congressional waivers of governmental immunity in the case of federal instrumentalities should be liberally construed indicate that such liberal construction should subject the instrumentality to restrictions not specifically set forth and which do not apply to other agencies or individuals in like situations. Certainly nothing in the *Burr* case can be considered specifically to render nugatory the rights, privileges and obligations arising under the various provisions of law affecting the removal of causes. Provided jurisdiction exists in the United States District Court, the mere fact that the state court also has jurisdiction granted by act of Congress does not deprive the parties of procedural rights such as the right to removal.

The question of jurisdiction is to be determined in the light of the well recognized rule that the jurisdiction of federal courts is conferred by Congress and is limited to the scope outlined in the acts of Congressional authorization, this of course with exception of the constitutional jurisdiction granted to the Supreme Court.

One element of jurisdiction of the district courts of the United States is the amount involved in the controversy with the accompanying requirement that the controversy arise under the constitution, laws or treaties of the United States. Another element is diversity of citizenship, 28 U. S. C. A., sections 1331, 1332.

The plaintiffs challenge the jurisdiction of this court on the ground that the amount in controversy is less than $3,000.00 and that there is no substantial federal question involved. Implicit in this contention is the thought that the complaint does not show on its face these primary requirements. If this be so then the motion to remand must prevail. But perusal of the allegations of the complaint makes it evident that the corporations involved, while incorporated under the laws of New Jersey, had as their purpose construction and operation of housing projects under and pursuant to the provisions of 12 U. S. C., sections 1738 and 1743 of the Federal Housing Act, which allegation is further borne out by the certificate of incorporation annexed to and made part of the complaint. As such they would be subject to the operation of the Federal Housing Act and the rules and regulations promulgated thereunder. Also attached to and made part of the complaint is a specification of the defaults alleged to have occurred and which were the basis of the action taken by the Commissioner of the Federal Housing Administration and which were sought to be enjoined by the plaintiffs. In their original complaint the plaintiffs assert that there were no defaults under the charter and the rules and regulations and again that these alleged defaults do not come within the scope of the definitions of default in the certificate of incorporation. It may be well to note that certain provisions of the certificate of incorporation are adopted bodily from the regulations issued in conformity with the Federal Housing Act, and it is violations of these very provisions which are charged in the enumeration of defaults set forth in the notice given by the Commissioner of the Federal Housing Administration. It would seem therefore that the

question is whether or not the acts alleged as defaults require an interpretation of the regulations of the Federal Housing Administration. The mere fact that these regulations were incorporated into the certificate of incorporation does not substitute an interpretation of the provisions of the certificate of incorporation for construction of the controlling regulations, such as would deprive this court of jurisdiction. It seems evident that consideration of the motion *sub judice* involves a question of whether or not the regulations apply to the factual situations set forth in the Commissioner's notices and letters, and if so, to what extent. There would seem therefore to be a substantial federal question involved in the instant action.

As for the jurisdictional amount, no specific sum is referred to in the complaint. The plaintiffs contend that the contemplated action of the Commissioner would cause immediate, substantial and irreparable damage to them. In the face of such indefiniteness and ambiguity the court feels justified in reference to the full record before it, particularly the petition for removal, *Langdon* v. *Hillside Coal & Iron Co.*, 41 Fed. 609, and by analogy, *Harvey* v. *American Coal Co., et al.*, 50 F. 2d 832, and *Lee Line Steamers* v. *Robinson*, 232 Fed. 417. From examination of the affidavits annexed to the petition for removal it would certainly seem that amounts far in excess of the minimum jurisdictional amount are involved.

As for diversity of citizenship, it would appear uncontroverted that the individual defendants reside in and have their principal office in the District of Columbia and that the Federal Housing Administration has its principal office in the District of Columbia. The individual plaintiffs are residents of New Jersey, and the plaintiff corporations are incorporated in New Jersey. This would indicate the requisite diversity of citizenship. But at the same time the authorization to sue and be sued, above referred to, would seem to carry with it the right to serve the Federal Housing Administration in any jurisdiction in which it is doing business, by virtue of the fact that it has been "launched

. . . into the commercial world" and "is not less amenable to judicial process than a private enterprise under like circumstances would be." *F. H. A.* v. *Burr, supra.*

There remains one other important aspect of the removal proceeding. It has to do with the provisions of 28 U. S. C. A. 1442, which provides

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

In view of the finding already made that a federal question is involved in this action, it follows that the right of removal, granted the propriety of that finding, is definitely established.

This court, of course, will not decide the factual dispute at this posture. However, it should now appear that the United States government, through a duly constituted agency, is directly involved in this dispute. The impact of housing on the national scene makes this case more than just a simple dispute between private stockholders for control of a corporation. The corporate charterers are directly within the control of federal law and a federal agency will be adversely affected, assuming these defaults are actual and continuing.

The motion to remand is denied.

Opinion and Findings of Fact and Conclusions of Law.

MEANEY, District Judge.

The plaintiffs, individuals resident in the State of New Jersey, and corporations organized under the laws of the State of New Jersey, seek to enjoin and restrain the defendants from holding a meeting of preferred stockholders of the plaintiff corporations, from voting the preferred stock of the plaintiff corporations for the purpose of removing the present boards of directors of the plaintiff corporations and electing new boards, and from interfering with the operations of the present boards of directors. The defendants, on the pleadings, moved to dismiss the proceedings on jurisdictional grounds, and in the alternative moved for summary judgment. It seemed proper to the court that the matter should be considered from the standpoint of the motion for summary judgment and it is with that idea in view that the court will proceed to examine the situation.

The undisputed facts would seem to be that the various corporations, Linwood Park Inc., Sections 1 to 13 inclusive, are corporations each acting under a charter granted under the authority of the laws of the State of New Jersey. The corporations were organized for the purpose of constructing and operating housing projects pursuant to the provisions of Section 608 of the National Housing Act (12 U. S. C. A., Section 1743) and in their certificates of incorporation they have agreed to be bound by the National Housing Act and the rules and regulations of the Federal Housing Administration promulgated thereunder.

The articles of incorporation of each of the plaintiff corporations authorized 300 shares of capital stock, of which 100 shares with a par value of $1.00 per share shall be designated "preferred stock" and 200 shares shall be designated "common capital stock" of no par value. Under the provisions of the National Housing Act the Federal Housing Administration acquired by purchase all of the preferred stock of each corporation. Ralph J. Solow and Sidney Sarner individually owned 50% of the issued common stock

of each corporation, each of them contributing $6,500.00, so that the total investment in the plaintiff corporations at the time they commenced doing business was $13,000.00.

The charters of the corporations give the holders of the preferred stock certain rights and privileges, among which is the right to replace existing directors in the event of the creation or existence of certain defaults under the terms of the certificates of incorporation. The language of the articles of incorporation with respect to defaults amounts to a practical repetition of the language of the regulations of the Housing Administration Commissioner.

In the event of a default the holders of preferred stock are entitled to elect new directors. The defaults enumerated in the articles of incorporation are adopted from the regulations issued by the Commissioner of the Federal Housing Administration. The pertinent regulatory provisions, made part of the articles of incorporation, are as follows:

> THIRD: (d) * * * So long as any property of this corporation is encumbered by a mortgage or Deed of Trust insured by the Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or Projects.
>
> FIFTH: (e) In the event of any default by the corporation as hereinafter defined, and during the period of such default, the holders of the preferred stock, voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead; Provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to elect directors shall again vest in the holders of the common stock.
>
> SIXTH: The corporation shall not without prior approval of the holders of a majority of the shares of preferred stock, given either in writing or by vote at a

meeting of the preferred stockholders called for that purpose (a) * * * (b) * * * (c) * * * (d) * * * (e) * * * redeem or cancel any of its shares of preferred stock, or effect any changes whatsoever in its capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this certificate of incorporation.

SEVENTH: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: * * * (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the By-Laws of the corporation, the Mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

(c) Upon any default by the corporation, the president or the secretary, or either of them, as may be required by law, shall, at the request in writing of the holders of record of a majority of shares of the preferred stock, addressed to him at the office of the corporation hereinabove designated and stating the purpose of the meeting, forthwith call a special meeting to take place within ten days after such call, of the preferred stockholders for the purpose of the removal of existing directors and the election of new directors. If such officers shall fail to issue a call for such meeting within three days after the receipt of such request, then the holders of a majority of the shares of the preferred stock may do so by giving notice as provided by law, or, if not so provided, then by giving ten days' notice of the time, place and object of the meeting by advertisement inserted in any newspaper published in the

county or city in which the principal office of the corporation is situated.

EIGHTH: * * * (f) At the request of the Commissioner, or of the holder of a majority of shares of the preferred stock, his or their agents, employees, or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

In August, 1950 each of the plaintiff corporations purchased the shares of common stock held by Solow for sums aggregating $1,318,425.16. This stock is now carried on the books of the corporations as Investments—Treasury Stock. This purchase was made without prior approval of holders of a majority of the shares of preferred stock, given in writing or by vote at a meeting called for that purpose.

The defendants urge that such action constituted a default in the contemplation of the provisions of the charters of the corporations. The plaintiffs contend that the purchase was made out of surplus and as such is a transaction authorized by the laws of New Jersey and does not amount to a default. It is well settled in New Jersey that capital stock may be purchased out of surplus, but for the purpose of the present motion—a motion for summary judgment—that is not immediately material. Whether the purchase was made out of surplus or not does not seem to be apparent from the pleadings. The present question is whether the result of such purchase is to effect any change whatsoever in its capital stock. While it is true that the stock is carried on the books of the corporation as an asset, it seems to the court that a definite change in the capital stock setup has been made. These shares so long as they are held in the treasury of the corporation lose the character they pos-

sessed when in the hands of individual holders, and even if lawfully bought out of surplus, their purchase constitutes a change in the capital stock. See *Borg* v. *International Silver Co.*, 11 F. 2d 147; *Wall* v. *United States*, 164 F. 2d 462; *Keefe* v. *Cote*, 213 F. 2d 651.

The next matter to be weighed is the question of whether there was a further default in the letter and spirit of the charter, brought about by the situation which developed when the corporations in the year 1951 collectively made long-term unsecured loans in the sum of $1,270,000.00 to three corporations whose common stock was owned and controlled (and still is) by Sidney Sarner. These corporations, Linwood Park Business Center, Inc., Linwood Park Business Center, Inc., Section 1, and Linwood Park Recreation Center, Inc., were organized for the erection and maintenance of buildings for a shopping and recreation center near the rental housing projects above referred to, but independent of them and of the control of the plaintiff corporations. These unsecured loans were represented by promissory notes payable in twenty to twenty-five years, with interest at 5%. While it is true that there is judicial pronouncement that "there is a distinction between a temporary loan of surplus funds of a corporation and the practice of lending the moneys of the corporation as if the corporation was a bank" (*Murray* v. *Smith*, 152 N. Y. S. 102 (App. Div.)), nevertheless the circumstances surrounding this extraordinary transaction clearly partake of the nature of a business transaction and as such it would seem to be within the prohibition of the charter provisions. This court as a consequence finds that the loan definitely constituted a default, made as it was without the antecedent authorization of the holders of the shares of preferred stock.

There remains to be passed upon a third alleged default. Section 8 (f) of the articles of incorporation of each of the plaintiff corporations provides as follows:

> At the request of the Commissioner, or of the holder of a majority of shares of the preferred stock, his or their agents, employees, or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage *and any other information with respect to the corporation or its property which may be requested.* (Emphasis supplied.)

On June 17, 1954 the Federal Housing Administration sent questionnaires to the plaintiff corporations requesting certain information, which they refused to answer. Following the general practice pursued by other corporations in similar circumstances, the plaintiff corporations assert that there is no charter provision requiring the furnishing of the information requested in the questionnaire, alleging that all answers to pertinent questions have been furnished to the Authority and that this questionnaire is an unwarranted attempt to secure information which the Authority has no right to demand. Inspection of the quoted provision of the charter makes it quite evident that the Authority has the right to seek any information with respect to the corporation or its property, and the information sought in the questionnaire relates "to the corporation or its property." Refusal to supply the required information constitutes a further default.

Because of these findings the court feels that it must grant the motion of the defendant for summary judgment in its favor, and the relief sought by plaintiffs is denied.

This opinion would seem to be an adequate expression of findings of fact and conclusions of law.

Let an order be submitted in conformity with this opinion.

Opinion of the Court.

(Filed December 21, 1955)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,638

SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, and LINWOOD PARK, INC., Sections 1 to 13 Inclusive, Each a Corporation of New Jersey,

Appellants,

v.

NORMAN P. MASON, Commissioner of the Federal Housing Administration, and ALBERT M. COLE, Housing and Home Financing Administrator, and FEDERAL HOUSING ADMINISTATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued November 17, 1955

Before BIGGS, Chief Judge, and KALODNER and HASTIE, Circuit Judges.

By BIGGS, Chief Judge.

The individual plaintiffs own all the common stock of the thirteen corporate plaintiffs. The corporate plaintiffs, corporations of New Jersey, constructed and operate housing projects financed through Federal Housing Administration insured loans. Pursuant to the statute and the regulations[1] the Commissioner of the FHA is the holder of

[1] 12 USCA §1734(b)(1); 24 CFR §§280.29.

all of the preferred stock of each of the corporations. Under the certificates of incorporation, which are substantially identical, the Commisioner, the sole preferred stockholder, has the right to replace the boards of directors of the corporations if any one of certain defaults specified in the charter take place. The Commissioner was of the view that three defaults had taken place and gave notice to the corporate defendants of his intention to hold preferred stockholders' meetings to elect new boards of directors as provided by the charters. The plaintiffs filed a suit in the Superior Court of Bergen County, New Jersey, seeking to enjoin the Commissioner from holding the meetings. The Commissioner and the other defendants removed the case to the court below. The plaintiffs sought to have it remanded to the state court. The court below denied this motion. The defendants then moved for summary judgment. Upon consideration of the whole record the court below granted summary judgment. The appeal at bar followed.

I.

The issue raised by the plaintiffs that the cause was not properly removed must be discussed briefly before we proceed to the merits.

Section 1441(a), Title 28, USC, states that an action may be removed from a state to a United States district court when the latter has original jurisdiction. Section 1442, Title 28, USC, provides that: "(a) A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place where it is pending: (1) Any officer of the United States or any agency thereof or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

From the affidavits filed by the defendants in this case, the statements of which are not denied, it appears that the Federal Housing Administration loaned large sums of money to the corporate plaintiffs. There is no doubt that the Commissioner in seeking to elect new boards of directors was acting under color of his office, in an official capacity and pursuant to the laws of the United States as contemplated by the statute. It follows that the cause was properly removable pursuant to Section 1442(a)(1). DeBusk *v.* Harvin, 212 F. 2d 143 (5 Cir. 1954); Jones *v.* Elliott, 94 F. Supp. 567 (E. D. Va. 1950) and Matarazzo *v.* Hustis, 256 Fed. 882, 889 (N. D. N. Y. 1919).

The argument made by the plaintiffs to the contrary, as we apprehend it, seems to have two elements. The plaintiffs say first that the suit presents no question involving the construction of the laws or of the Constitution of the United States and that the only issue involved is the construction of New Jersey corporate charters under the law of New Jersey. Second, they state, Section 1702, Title 12, USCA, the National Housing Act, indicates that if only questions of state law be involved removal is prohibited.

Section 1702 provides in pertinent part that, "The Commissioner shall, in carrying out the provisions of . . . [the Act as specified in this section], be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." The plaintiffs seem to assert that in enacting this provision Congress intended to do away with, or in some way to limit, the removal provisions of Section 1442(a)(1).

We cannot follow the argument and, if it be seriously made, it is sufficient to point out that, in enacting Section 1702, Congress intended to permit the Commisioner to sue, and, waiving sovereign immunity, to permit him to be sued in actions arising under the National Housing Act in any court of competent jurisdiction. See Korman *v.* FHA, 113 F. 2d 743 (D. C. Cir. 1940). Section 1702 was not intended to affect and did not affect the right of removal inhering in the Commissioner under the removal statute.

II.

The defendants allege that there were three separate defaults by the plaintiff corporations, as follows: (1) an unauthorized redemption of common stock; (2) the making of certain unapproved long-term loans; and (3) a refusal to furnish information and data requested by the Federal Housing Administration. This court and the court below make take judicial notice that the Senate Committee on Banking and Currency, with Senator Homer E. Capehart as Chairman, investigated certain credit abuses by corporations, such as the corporate plaintiffs, which had availed themselves of FHA credit.

As a result of the Congressional investigation, on June 17, 1954, a questionnaire was sent by the Commissioner to all mortgagors who had obtained credit under Section 608 of Title VI of the National Housing Act. The corporate defendants were such mortgagors. The twenty-first question of the questionnaire requested information as to the actual costs of the projects secured by government credit and the disposition of the difference, if any, between the amounts of the mortgage and the sums expended. Data as to land costs and actual construction costs were called for by the questionnaire as were total amounts of sub-contracts and various other items of great importance to the United States and to the Federal Housing Administration. The Commissioner's letter of transmittal and the questionnaire were received by the corporate plaintiffs. This was not denied.

On July 29, 1954, one of the individual plaintiffs, Sidney Sarner, an officer of the corporate defendants and the person substantially in charge of their management, addressed a letter upon the stationery of "Sarner Management Co." to the Federal Housing Administration stating: "That information which is your right has been rendered to you in our annual statements. Our books are available to you to substantiate their truth, beyond such, we cannot abide in

your request. Regarding the dividend and the stock redemption, our charter established our rights. Wherein your directive is to the contrary, we cannot be expected to comply with the same." This was direct refusal to furnish information sought by the Federal Housing Administration by the questionnaire.

Paragraph Seventh (a), of the Certificate of Incorporation of the corporations, provides: "The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: . . . (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate. . . ." Paragraph Eighth (f) of the Certificate of Incorporation provides: "At the request of the Commissioner, or of the holder of a majority of shares of the preferred stock [here the same person], his or their agents, employees, or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested."

On the refusal by Sarner, by his letter of July 29, 1954, to furnish the information required by the questionnaire, there was a breach of this covenant by the corporations. The fifteen days of Paragraph (a)(4) had already expired when Sarner made his reply of July 29, 1954, refusing to give to the FHA the information requested. The default remains uncured to this day. There was, therefore, a continuing default within the meaning of Paragraph Seventh (a) of the charters.

Paragraph fifth (e) of the charters provides that: "In the event of any default by the corporations as herein-

after defined, and during the period of such default, the holders of the preferred stock, voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead. . . ." As we have said, the Commissioner is the sole preferred stockholder of the defendant corporations. The Federal Housing Administration therefore possesses the right to remove all the existing directors of the corporations and to elect new directors in their stead as provided by Paragraph Fifth (e) of the charters. The suit filed by the plaintiffs to enjoin such action is without merit and cannot be maintained.

No material issue of fact remaining as to the third default, the case was ripe for summary judgment as entered by the court below.

In view of our decision on this issue of the third default, no discussion of the other points raised by the parties is required.

The judgment appealed from will be affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Third Circuit.

Order Amending Opinion.

Present: Biggs, Chief Judge, and Kalodner and Hastie, Circuit Judges

And Now, to wit, this 23rd day of December, 1955, it is Ordered that the word "defendants" in the first line following "I" in the slip opinion filed herein on December 21, 1955, be stricken out and that there be substituted in lieu thereof the word "plaintiffs".

For the Court,

Biggs,
Chief Judge.